

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION  
MINUTES OF MEETING, Public Session

August 11, 2003

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 10:06 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Phil Blair, Sheridan Downey, Pamela Karlan, and Thomas Knox were present.

**1. Public Comment.**

There was no public comment on items not on the agenda.

**Consent Items**

Commissioner Downey asked that item #4 be pulled from the consent calendar.

Commissioner Karlan moved approval of the following items, with a correction noted on item #2 and with Commissioner Knox abstaining from the vote on item 15ddd:

**2. Approval of the Minutes of the July 10, 2003, Commission Meeting.**

Commissioner Karlan corrected the 6<sup>th</sup> line of the last paragraph on page 4. The "... " should be changed to read, "a committee on the measure."

**3. In the Matter of George Engasser, FPPC No. 02/90.** (1 count.)

**5. In the Matter of United Food and Commercial Workers Issue Education Fund, John Perez, and John Sperry, FPPC No. 01/388.** (14 counts.)

**6. In the Matter of United Public Employees Local 790 COPE: Non-Candidate Committee; United Public Employees Local 790 COPE: Candidate Committee; and Josephine Mooney; FPPC No. 01/248.** (3 counts.)

**7. In the Matter of Service Employees International Union, FPPC No. 01/392.** (1 count.)

**8. In the Matter of Benjamin S. Elias, Ben S. Elias for Assembly and Armen Elias, FPPC No. 00/62.** (1 count.)

**9. In the Matter of Olsen Power Partners; FPPC No. 02/715.** (1 count.)

10. *In the Matter of Synergics Telemetry, LLC; FPPC No. 02/718.* (2 counts.)
11. *In the Matter of Denise Johnson, FPPC No. 02/61.* (1 count.)
12. *In the Matter of Gopal Chaturvedi, FPPC No. 01/741.* (1 count.)
13. *In the Matter of Michael L. Torr; FPPC No. 01/626.* (1 count.)
14. *In the Matter of David Williamson, FPPC No. 02/404.* (1 count.)
15. **Failure to Timely File Major Donor Campaign Statements.**
  - a. *In the Matter of Arturo & Barbara Sneider, FPPC No. 2003-308.* (1 count.)
  - b. *In the Matter of Diana Martin, FPPC No. 2003-310.* (2 counts.)
  - c. *In the Matter of Edythe Broad, FPPC No. 2003-311.* (2 counts.)
  - d. *In the Matter of Herbert A. Allen, FPPC No. 2003-314.* (1 count.)
  - e. *In the Matter of Dr. Jerrold A. Hiura, FPPC No. 2003-315.* (2 counts.)
  - f. *In the Matter of John F. Nickoll, FPPC No. 2003-316.* (1 count.)
  - g. *In the Matter of Peter K. Barker, FPPC No. 2003-318.* (1 count.)
  - h. *In the Matter of William & Lee Bell, FPPC No. 2003-320.* (1 count.)
  - i. *In the Matter of Liquidity Financial Group, FPPC No. 2003-321.* (1 count.)
  - j. *In the Matter of Paxson Communications Corporation, FPPC No. 2003-323.* (1 count.)
  - k. *In the Matter of Snelling Personnel Services, FPPC No. 2003-324.* (1 count.)
  - l. *In the Matter of 2228 Union Street Investors, FPPC No. 2003-325.* (1 count.)
  - m. *In the Matter of AV Consultants, Inc., FPPC No. 2003-326.* (1 count.)
  - n. *In the Matter of Advertising Display Systems, FPPC No. 2003-327.* (1 count.)
  - o. *In the Matter of Applied Materials, FPPC No. 2003-328.* (1 count.)

- p. *In the Matter of Aribo Corporation, FPPC No. 2003-329.* (1 count.)
- q. *In the Matter of Lawrence J. Ellison, FPPC No. 2003-333.* (1 count.)
- r. *In the Matter of HACH Company, FPPC No. 2003-334.* (1 count.)
- s. *In the Matter of HNR Framing Systems, Inc., FPPC No. 2003-335.* (1 count.)
- t. *In the Matter of MBK Homes, Ltd., FPPC No. 2003-337.* (1 count.)
- u. *In the Matter of Oliver McMillan, LLC, FPPC No. 2003-338.* (1 count.)
- v. *In the Matter of Jerry Neil Paul, FPPC No. 2003-340.* (1 count.)
- w. *In the Matter of Valley View Casino, FPPC No. 2003-342.* (1 count.)
- x. *In the Matter of Jackson Wen, FPPC No. 2003-343.* (1 count.)
- y. *In the Matter of Annette M. Williams, FPPC No. 2003-344.* (1 count.)
- z. *In the Matter of Williams Scotsman, FPPC No. 2003-345.* (1 count.)
- aa. *In the Matter of Robert Yu, FPPC No. 2003-346.* (1 count.)
- bb. *In the Matter of Z Valet, Inc., FPPC No. 2003-347.* (1 count.)
- cc. *In the Matter of AguaClara, LLC, FPPC No. 2003-371.* (1 count.)
- dd. *In the Matter of Martha A. Bell, FPPC No. 2003-373.* (1 count.)
- ee. *In the Matter of Bentley Systems, Inc., FPPC No. 2003-374.* (1 count.)
- ff. *In the Matter of Bernard B. Roth & Affiliate World Oil Corporation, FPPC No. 2003-375.* (1 count.)
- gg. *In the Matter of Bosa Development California, Inc., FPPC No. 2003-376.* (1 count.)
- hh. *In the Matter of Breadboard Enterprises, FPPC No. 2003-377.* (1 count.)
- ii. *In the Matter of Peter L. Bittenwieser, FPPC No. 2003-380.* (1 count.)
- jj. *In the Matter of C.C. Myers, Inc., FPPC No. 2003-381.* (1 count.)
- kk. *In the Matter of C.W. Poss, Inc., FPPC No. 2003-382.* (2 counts.)
- ll. *In the Matter of Russell L. Carson, FPPC No. 2003-386.* (1 count.)

- mm. *In the Matter of Christopher J. Conway, FPPC No. 2003-389.* (1 count.)
- nn. *In the Matter of Donal J. Murphy, FPPC No. 2003-391.* (1 count.)
- oo. *In the Matter of Larry N. Feinberg, FPPC No. 2003-395.* (1 count.)
- pp. *In the Matter of Harold R. & Diana Frank, FPPC No. 2003-396.* (1 count.)
- qq. *In the Matter of Steve Gorlin, FPPC No. 2003-398.* (1 count.)
- rr. *In the Matter of Michael Henson, FPPC No. 2003-400.* (1 count.)
- ss. *In the Matter of International Creative Management, Inc., FPPC No. 2003-401.* (1 count.)
- tt. *In the Matter of JLD Staffing, Inc., dba HR Staffing, Inc., FPPC No. 2003-403.* (1 count.)
- uu. *In the Matter of Kinetics Group, Inc., FPPC No. 2003-406.* (1 count.)
- vv. *In the Matter of Ronald K. Loder, FPPC No. 2003-409.* (1 count.)
- ww. *In the Matter of McSherry & Hudson, FPPC No. 2003-412.* (1 count.)
- xx. *In the Matter of Meritage Homes of Northern California, Inc., FPPC No. 2003-413.* (1 count.)
- yy. *In the Matter of Greg C. Mosher, FPPC No. 2003-415.* (1 count.)
- zz. *In the Matter of Opus West Corporation, FPPC No. 2003-417.* (1 count.)
- aaa. *In the Matter of Lawrence A. Post, FPPC No. 2003-419.* (1 count.)
- bbb. *In the Matter of Provender Capital Group, LLC, FPPC No. 2003-420.* (1 count.)
- ccc. *In the Matter of J. Miles Reiter, FPPC No. 2003-422.* (1 count.)
- ddd. *In the Matter of Reynen & Bardis Development, LLC, FPPC No. 2003-423.* (1 count.)
- eee. *In the Matter of John A. Schneider, FPPC No. 2003-426.* (1 count.)
- fff. *In the Matter of Daniel L. Skaff, FPPC No. 2003-427.* (1 count.)
- ggg. *In the Matter of Taisei Construction Corporation, FPPC No. 2003-428.* (1 count.)

- hhh. *In the Matter of Trevor D. Traina, FPPC No. 2003-429.* (1 count.)
- iii. *In the Matter of Van Wagner Communications, LLC, FPPC No. 2003-432.* (1 count.)
- jjj. *In the Matter of Verner, Liipfert, Bernhard, McPherson & Hand, Chartered, FPPC No. 2003-433.* (2 counts.)
- kkk. *In the Matter of Wackenhut Corrections Corporation, FPPC No. 2003-434.* (1 count.)
- lll. *In the Matter of Webb Survivor's Trust, FPPC No. 2003-435.* (1 count.)

**16. Failure to Timely File Major Donor Campaign Statements.**

- a. *In the Matter of tBP Architecture, FPPC No. 2003-349.* (2 counts.)
- b. *In the Matter of Glenn Doshay, FPPC No. 2003-392.* (1 count.)
- c. *In the Matter of United Rentals, Inc., FPPC No. 2003-431.* (1 count.)

Commissioner Downey seconded the motion.

Commissioners Blair, Downey, Karlan, Knox and Chairman Randolph voted “aye,” with Commissioner Knox abstaining from item #15ddd.

**17. Approval of Changes to Recall Fact Sheet.**

Staff Counsel Scott Tocher explained that the proposed recall fact sheet implemented the Commission’s decisions in their July 2003 adoption of regulation 18531.5, and applied those decisions to specific factual situations that staff anticipated would arise. Mr. Tocher stated that the Commission determined that contribution and expenditure limits do not apply to the target of a recall, but that contribution limits did apply to replacement candidates. The Commission also decided that ballot measure committees were not subject to limits.

Mr. Tocher explained that the staff memo discussed how expenditures by the target of the recall would be characterized and treated, and whether candidates can control ballot measure committees, concluding that candidates can control those committees. The memo also discusses the treatment of “hybrid” expenditures – those that are related to both a replacement candidate and the candidate controlled ballot measure committee. Lastly, the staff memo discusses case law issues that arose at the July 2003 meeting.

Mr. Tocher outlined the format of the proposed fact sheet, noting that it first addresses broad issues and then addresses the more technical issues.

Stephen Kaufman, from the firm of Smith Kaufman, and speaking on behalf of Governor Gray Davis (along with James Harrison, from Remcho, Johansen and Purcell), stated that he supported the Commission's decisions when they adopted regulation 18531.5. He believed that staff's proposed fact sheet fairly well reflected their position on the recall questions. He supported staff's recommendation that the target of the recall may raise and spend unlimited funds to oppose the recall and to take issue with other candidates, because it is impossible to separate the two issues. He urged the Commission to adopt the fact sheet up through and including question #8. He did not entirely agree with the staff recommendation regarding replacement candidate expenditures.

Commissioner Knox asked Mr. Kaufman whether he believed § 85315 allowed the target official to both oppose the recall election and attack replacement candidates without regard to any limits.

Mr. Kaufman responded that § 85315 allowed that scenario. He explained that an election involves both positives and negatives, and pointing out the inadequacies of the candidates seeking to replace the target official is an integral part of the target official's opposition strategy. He pointed out that the language of § 85315 provides that a target may use unlimited funds to "oppose the recall election."

Commissioner Knox asked Mr. Kaufman whether he agreed with the staff position that a ballot measure committee, including a candidate-controlled committee, can raise unlimited monies to support the recall effort.

Mr. Kaufman responded that he questioned that analysis. In the scenario where a replacement candidate controls a ballot measure committee, the ballot measure committee would be making expenditures "at the behest" of the candidate. He believed those expenditures would be part of the replacement candidate's campaign to replace the target.

In response to a question, Mr. Kaufman stated that regulation 18225.7 provided statutory authority for his position where it provides that a committee acting at the direction or control of an elected official is acting "at the behest" of the official. He stated that a ballot measure committee that was formed apart from the candidate would not fall in the same category, but that recall committees that are controlled by a replacement candidate should be considered as acting "at the behest."

In response to a question, Mr. Kaufman did not believe that a ballot measure committee should not be controlled by a replacement candidate. However, the recall ballot question is fundamentally tied to the replacement candidate question, making them inextricably intertwined, and the ballot measure committee should be subject to limits when the replacement candidate controls that committee.

Commissioner Knox observed that the logic should work the other way as well, and that § 85315 could be read to mean that the target official can not only oppose the recall election but can also, without limits, oppose specific replacement candidates. If so, then

a candidate who controls a ballot measure committee should be able to support the recall and support specific candidates without limits because it is part of the recall process.

Mr. Kaufman responded that the Act subjects that candidate to limits. He believed the two questions are joined for both the target and the replacement candidate. The statute allows the target to operate with unlimited funds, and he believed that should be applicable to both ballot questions. The statute subjects the replacement candidate to limits, and it should be applicable to both ballot questions.

Commissioner Knox pointed out that the replacement candidate would be subject to limitations if the committee's expenditures are made on behalf of the candidate. If those expenditures are made to support the recall then they should not be subject to limits.

Mr. Kaufman responded that, as behested payments controlled by the replacement candidate, the expenditures have limits.

In response to a question, Mr. Kaufman stated that he was not opposed to the existence of candidate controlled ballot measure committees, but believed them to be pointless for the replacement candidate in a recall election because the ballot measure committee would be subject to the limits.

Commissioner Karlan suggested that the two ballot questions could be separated if a replacement candidate opposed the recall, but ran as a replacement candidate in case the recall is successful.

Mr. Kaufman responded that expenditures benefiting the replacement candidate's candidacy, which are controlled by that replacement candidate, should be subject to the limits because it is part of their campaign approach.

Commissioner Knox suggested that the issue could be resolved by interpreting § 85315 to mean that the target official could take a position without limits on the recall question, but not regarding the replacement candidates.

Chairman Randolph stated that she did not see the inconsistency between the two. She explained that the target officer and the replacement candidate are treated differently by the statute. She saw no problem with treating the two differently because they are different.

Commissioner Knox stated that staff and Mr. Kaufman interpret § 85315 to provide that opposing a specific replacement candidate is part of opposing the recall election. They also interpret it to mean that a ballot measure committee controlled by a candidate may, without limits, support the recall, but cannot support a replacement candidate. He believed that the logic should work both ways, and that, if the target of the recall can support or oppose a replacement candidate without limits, then the replacement candidates should have the same right.

Commissioner Downey observed that the unfairness of the statutes seemed to be the issue, because the target officer is not subject to limits while the replacement candidates are subject to limits. He did not agree with Commissioner Knox that replacement candidates might not be subject to the limits, even though the philosophical approach had some appeal. He noted that both Mr. Kaufman and Commissioner Knox agreed that the target candidate could oppose the recall and the replacement candidates without limits. However, staff suggested that the replacement candidates must be able to segregate their contributions and expenditures with respect to opposing the recall and advocating their own candidacy. He agreed with staff's interpretation of the statute even though it was not balanced.

Commissioner Knox stated that Commissioner Downey's conclusion may be correct, but noted that, under § 85315, opposition to the recall election does not extend to opposing specific replacement candidates.

Kathy Donovan, from Pillsbury Winthrop, and representing corporations and Arnold Schwarzenegger, supported allowing replacement candidates to have a recall measure committee that is not subject to limits. She noted her concern about the unfairness of letting the target of the recall work without limits while the replacement candidate must work with limits. She explained that individuals have the right to support or oppose a measure without limits, and that candidates have the same First Amendment rights to participate in ballot measure advocacy.

Ms. Donovan stated that there will be more questions that will need to be addressed through the advice letter process, specifically questions about how the limits work and defining what promoting a candidacy means. She noted that express advocacy issues will also arise.

In response to a question, Ms. Donovan stated that she supported staff's proposal allowing replacement candidates to work without limits to support the recall.

Ms. Karlan asked whether she believed that a line could be drawn that would allow donors to know whether their contribution was subject to limits.

In response to a question, Ms. Donovan stated that the names of the Committees will make clear which committee is soliciting contributions.

In response to a question, Ms. Donovan stated that there would be constitutional problems with a rule providing that all monies spent by a replacement candidate controlled ballot committee or a candidate election committee were subject to limits. She noted that it would affect the replacement candidate's ability to support or oppose the recall effort. She explained that the *Wax* case illustrated the constitutional issues. The candidate should have the same opportunity to argue for or against a recall, just like anyone else.

In response to a question, Ms. Donovan stated that the scenario where a candidate's advertisement opposed the recall but asked for votes in case the recall succeeded could be handled by staff's proposal to apportion the expenditures. The apportionment calculations should consider the time involved, and may need advice letters for clarification.

Charles Bell, from Bell, McAndrews, Hiltachk and Davidian, and on behalf of Californians for Schwarzenegger, agreed with Ms. Donovan's concerns. He believed that there was a constitutional issue if the target is allowed to use unlimited funds for both questions on the recall ballot, while a replacement candidate's committee cannot. He suggested that the nature of the communication should be a consideration. Mr. Bell noted that the regulations must comply with the constitution.

Chairman Randolph questioned whether they were really being treated differently, if one assumes that a ballot measure committee supporting a recall must do so by attacking the target.

Mr. Bell responded that any communication by either a committee that favors the recall or the target who opposes the recall is treated as a ballot measure question and no limits apply. The problem arises when there are advertisements that deal with both the ballot measure and candidate advocacy. He suggested that the target who makes expenditures expressly advocating the election or the defeat of a replacement candidate should do so with monies subject to limits.

Commissioner Karlan stated that the target officer will be saying that the people in the replacement pool are so unqualified that the voters should vote against the recall. She suggested that the target officer is, in some sense, indifferent to the preferences of the electorate because all of the replacement candidates are inferior and voters should vote no on the ballot measure.

Mr. Bell responded that elections are not conducted that way. It was likely that a target official will try to besmirch all candidates.

Commissioner Karlan agreed, but noted that the goal would be to get voters to believe that none of the replacement candidates should be elected.

Mr. Bell responded that Mr. Kaufman's argument that the two ballot questions are so related that they are integral is questionable. If a target officer's committee can accept unlimited funds, that account would receive many donations, while the replacement candidate could not spend the same amount of monies to make the same point.

Commissioner Blair asked whether Mr. Bell would object to not allowing the replacement candidate or his or her name appear in an advertisement opposing the recall if there were no limits on the expenditures for the advertisement.

Mr. Bell responded that the FCC would likely consider the recall question on the ballot a candidate election, and the candidate would be eligible for the lowest unit charge on advertisements. Ballot measure committees controlled by a replacement candidate would probably have to pay the highest charges for their advertisements.

Commissioner Blair stated that the public would know a replacement candidate's advertisement supporting the recall was also intended to convey the message that the voter should vote for that candidate. Not allowing the candidate to appear or have their name in the advertisement would balance that concern.

Mr. Bell pointed out that FCC rules require that the candidate be identified in the advertisement if the candidate's controlled committee funded the advertisement. He urged that question #8 on the proposed fact sheet be revised to focus on the communication.

Commissioner Downey responded that it could create a practical problem of enforcement. He asked whether a target official's advertisement making a broad statement about the inadequacies of all of the replacement candidates should be subject to limits.

Mr. Bell did not think that the example should be subject to limits. However, if the advertisement said, "Defeat Schwarzenegger," it should be subject to limits.

Commissioner Downey asked if the advertisement should be subject to limits if 5, 10, or 100 replacement replacement candidates were named.

Mr. Bell responded that the apportionment proposal could answer that issue, but how the apportionment calculation was made was important.

Chairman Randolph asked whether an advertisement that said, "Vote yes on the recall, the target officer is a fool," would not be subject to the limits under Mr. Bell's scheme, but if the advertisement said, "Vote no on the recall, because replacement candidates are fools," it would be subject to limits.

Mr. Bell stated that if the advertisement contained express advocacy and supported the recall, the expenditures should be apportioned.

Chairman Randolph pointed out that the replacement candidate's advertisement would not be subject to apportionment, while the target officer's advertisement would be apportioned and part of it would be subject to limits under Mr. Bell's scenario.

Mr. Bell disagreed, noting that, when both messages are communicated on the two ballot questions, then the portion of the expenditure related to the replacement question should be subject to limits and the portion related to the ballot measure should not for both the target and the replacement candidate.

Commissioner Karlan asked whether question #8 provides that there is no advertisement by a target official that, under any circumstances, would be subject to limits.

Mr. Tocher responded that there are circumstances under which the target official's expenditures would be subject to limits. The answer to question #8 was general. If a target candidate were to make an expenditure to advocate a replacement candidate, it could be considered an independent expenditure or a contribution. If the expenditure were coordinated with the replacement candidate, it would be a contribution and would be subject to limits. If it was not coordinated, it would be an independent expenditure, and candidates are not allowed to make independent expenditures out of their controlled committees.

Commissioner Knox stated that § 85315 clearly provides that the target officer's exemption from limits relate only to opposing the recall, not to supporting a replacement candidate.

In response to a question, Mr. Tocher stated that question #8 does not address the issue of a target official whose advertisements both oppose the recall question and advocate a particular candidate if the voter chooses to support the recall.

Fred Lowell, with Pillsbury Winthrop, representing the same candidates as Ms. Donovan and major donors, reiterated that a target candidate who takes a position on the replacement candidate ballot question should not be able to do so without limits, and he did not think that the statute would support that. He noted that the rules that the Commission adopted would be a guide for future recall elections. He suggested that any expenditure of funds or any advertisement that unequivocally and unambiguously endorses or advocates the defeat of a candidate should be subject to limits.

In response to a question, Mr. Lowell stated that the target officer has the right to oppose the recall and attack, in a generic way, the replacement candidates. If the target decides to unequivocally and unambiguously advocate the election or defeat of a replacement candidate it should be subject to limits.

Commissioner Karlan asked whether limits should apply if the target candidate opposes the recall and says a replacement candidate is a crook in the advertisement.

Mr. Lowell asked whether the replacement candidate could support the recall without limits if the advertisement also said that the replacement candidate was not a crook.

Commissioner Karlan sympathized with his position, but noted that it was hard to come up with a bright line.

Mr. Lowell responded that there will be advertisements like that. Recall candidates will make accusations about the replacement candidates without limits and those candidates should be able to respond to those accusations without limits.

Commissioner Karlan stated that the replacement candidate's responses provide no reason to vote for the recall, so the scenarios were not symmetrical.

Chairman Randolph pointed out that the replacement candidate could respond by supporting the recall because the target officer is an idiot.

Mr. Lowell stated that giving one side no limits at all was overbroad and unfair, and will create many problems.

In response to a question, Mr. Tocher stated that the answer to the question, "May an elected state official who is subject to a recall make expenditures to oppose the recall and to support a replacement candidate?" would be no.

Chairman Randolph clarified that the fact sheet was not saying that any expenditure related to the recall is not subject to limits. She believed that § 85315 provided that the target officer can oppose the recall, noting also that there is no provision requiring the Commission to tell the target officer how to oppose the recall. Likewise, the Commission does not tell the supporters of the recall what strategy they must use to support the recall.

Mr. Lowell responded that the statute provides a "safe harbor" for the target, as long as the target is opposing the recall, justifying their record, or attacking generally the replacement candidates' records. However, if the target officer gets involved in the replacement part of the election, then a different rule should apply.

Mr. Tocher stated that the polls show that voters and strategists seem to think that there is a connection between the qualification of replacement candidates and whether the recall will succeed, evidenced by the fact that the target, in the current example, seems to think that an expenditure related to the qualifications of the replacement candidates is related to the overall strategy of opposing. Otherwise, he noted, it would seem illogical to spend money on something that has no impact. If the target is wrong, then it is a waste of money. If the target is right, then it really is a valid action for opposing a recall.

Commissioner Karlan suggested that the target could be meddling in the replacement question if the target's advertisements expressly state, "Vote against replacement candidate X." On the other hand, if the target says, "Candidate X is a fool," it would not express advocacy and would be an advertisement to oppose the recall.

Colleen McAndrews, from Bell, McAndrews, Hiltachk and Davidian, and Treasurer of "Californians for Schwarzenegger," blamed the issue on the members of the Legislature who drafted Proposition 34, the Governor for signing the legislation, and the incumbent minority in the Legislature who supported the measure. She pointed out that she urged the Commission to adopt a regulation that would allow symmetry between the target and the replacement candidates at its last meeting, but that there appeared to be little support for that position. She supported staff's position because it would provide more balance than Mr. Kaufman's proposal.

Ms. McAndrews pointed out that there would not be time to ask the court to review the issues before the upcoming recall election, but opined that there would be court challenges to the structure that the Commission was setting up. She noted that there have been a number of recall elections in California at the local level, but that this was the first at the statewide level and it was testing the Proposition 34 recall provisions.

Ms. McAndrews stated that there was still a lot of ambiguity in the discussions, and noted that staff said that the candidate is responsible for bearing the burden of any ambiguity created by the candidate's expenditures. She asked whether there would be a process in place that would help treasurers determine whether an advertisement can be funded with unlimited or limited funds, and what a disclaimer would have to say.

General Counsel Luisa Menchaca responded that, historically, one or two attorneys have been made available by phone to answer questions. She could not guarantee that staff would be able to respond to every question, but legal division would be structured in a manner to deal with as much as possible.

Ms. McAndrews supported Ms. Menchaca's proposal on a practical level, but believed, on a political level, that it would be wrong for government to set itself up as the political speech police.

James Harrison, from Remcho, Johansen and Purcell, disagreed with the premise underlying the arguments about fairness. He believed that the target and the replacement target are not similarly situated. He explained that the target cannot be the replacement candidate and, consequently, the target must receive a majority of the vote. The replacement candidate would win by only a greater plurality of the vote. Additionally, the target is opposed by over 200 candidates who would be urging the public to vote "yes" on the recall question.

Mr. Harrison stated that there are legitimate reasons for the statute to treat the target differently than the replacement candidates, including the stability of California government and preventing evasion of the contribution limits. He explained that, if replacement candidates were permitted to spend unlimited funds on both questions, candidates may seek out recall elections in order to avoid all contribution limits when running for office. He believed that would jeopardize California government stability.

Chairman Randolph supported the fact sheet as proposed by staff.

In response to a question, Mr. Tocher stated that segregating the expenditures of the governor's committees into expenditures for the recall and expenditures addressing the qualifications of individual replacement candidates would have little impact in the upcoming recall election because the governor's committee was formed prior to the effective date of Proposition 34 and is therefore not subject to the limits of Proposition 34. Expenditures from that committee can be made for political, legislative or governmental purposes, and he believed that expenditures made to retain the governor's office would fit within those definitions. Therefore, the governor's committee could

accept contributions and make expenditures without regard to limits, including, he believed, expenditures made to oppose a candidate to maintain an office.

Mr. Kaufman pointed out that the governor has, in addition to the pre-Proposition 34 committee, set up another committee to oppose the recall election.

Commissioner Downey requested that fact sheet item #7 be changed to read, "How do donors know whether the committee to which they contribute is governed by limits?"

Mr. Tocher noted that there were correlating grammatical changes in the second to the last and last sentences. Additionally, he corrected the second line under question #22, so that "within 90" be changed to "within 45" pursuant to § 85310. Mr. Tocher suggested that a sentence stating that the expenditure limits for governor are \$10,624,000, after the adjustment required by law, to the end of the answer for question #3.

Commissioner Karlan suggested that the word "subject" on the second line of the second paragraph of page #6 be changed to "target."

Ms. Menchaca added that the language, "oppose the recall," on page #6, the fifth line of the third paragraph, be changed to, "oppose or support the recall." She also suggested that the language, "or spend" on question #5 be deleted. She suggested that a sentence be added indicating that, in addition, there is a \$100,000 limit on personal loans pursuant to § 85307, to clarify that it would be applicable.

There was no objection to any of the above changes.

Commissioner Downey moved to accept the staff's draft and recommendation on the recall election.

Commissioner Karlan seconded the motion.

Commissioner Blair suggested that a sentence be added to question #8 that would prohibit the target official from supporting a replacement candidate with unlimited funds.

Commissioner Downey stated that question #8 did not address that issue, and that he did not want to amend his motion to make that change, noting that the issue has not been given enough thought and he did not agree that it belonged in the fact sheet.

Chairman Randolph noted that she did not think it would be an issue in the immediate recall election, but the question may need to be addressed at a later time.

Commissioners Blair, Downey, Karlan and Chairman Randolph voted "aye."

Commissioner Knox voted "no." The motion carried by a vote of 4-1.

## **18. Second Pre-notice Discussion of Proposed Regulation 18709 (Formerly Regulation 18702.6) - Segmentation Rules**

Staff Counsel Natalie Bocanegra stated that the proposed language in the staff memorandum was discussed at the Commission's June 2003 meeting, during the Commission's discussion of conflict of interest rules with regard to general plan issues. She explained that an official with a financial interest in a decision may participate in other related decisions provided the official does not have a financial interest in the other decisions and that the segmentation process is followed. She noted that the concept was introduced in the *Owen* opinion, and that staff has reiterated it as advice.

Ms. Bocanegra discussed the proposed regulation, noting that the segmentation procedure is outlined in subdivision (a). Subdivision (b) clarifies when decisions are "inextricably interrelated". Subdivision (c) codifies special rules relating to final decisions concerning an agency's budget and certain general plan adoption or amendment decisions. She stated that the proposed regulation also includes a comment stating that the regulation implements the segmentation principle outlined in the *Owen* opinion.

Ms. Bocanegra explained that the staff memo described scenarios where one decision is contingent upon another. She highlighted one of those scenarios where a county amended a mandatory general plan element that limited the number of housing units on an annual basis, noting that the amendment must contain findings that justify reducing housing opportunities. In that scenario, a decision to initiate the process to develop those findings would be inextricably interrelated to a decision to limit the number of housing units. The finding would be the condition precedent to a decision to limit the housing units.

Ms. Bocanegra stated that option 1 was language taken from Commission advice letters. Option 2 was similar to option 1 but omitted the terms, "condition precedent" and "condition subsequent." . She explained that option 3 incorporates the conditions of "condition precedent" and "condition subsequent" by describing the circumstances under which the decisions are inextricably interrelated. Staff recommended codification of the segmentation rules since it would make the procedure more accessible and recommended option 2.

In response to a question, Ms. Bocanegra stated that staff had not heard any public concern related to the phrase, "inextricably interrelated," but that staff had historically used the phrase in advice letters.

Commissioner Karlan stated that the use of the terms "one decision" and "another decision" was confusing. She found that the kinds of decisions that cannot be segregated were those where the officeholder's decisions on the things the officeholder is entitled to vote on will alter, determine, affirm or nullify the things the officeholder is not entitled to vote on. She noted that there may be a huge number of decisions that fit the rule but are not inextricably intertwined.

Commissioner Karlan explained that in the scenario presented by Ms. Bocanegra, where the county decided to limit the number of housing units and the official did not vote on that issue, it would be appropriate for the official to vote on the subsequent zoning.

Ms. Bocanegra responded that the concept of implementation decisions in the staff memorandum addressed that issue. Staff advised that, when a public official has a financial interest in a decision and does not participate in that decision, the official may participate in implementation decisions because there is no financial effect in the subsequent implementing decisions.

Commissioner Downey stated that he preferred option 2.

Chairman Randolph agreed.

Ms. Bocanegra noted that the regulation was numbered 18702.6 and has been renumbered to 18709 because officials apply the process after it has been determined that a conflict of interest exists.

Commissioner Karlan suggested that the regulation use either “segmentation” or “segregation” but not both.

Chairman Randolph suggested that “segmentation” be used, and that the regulation be brought back for adoption using option 2.

**4. In the Matter of AMAC Information & Graphics and William MacAlpin, FPPC No. 99/237.** (1 count.)

Commissioner Downey stated that the case involved a company in the business of printing political flyers, which claimed that it received a large amount of money from an anonymous source for mailing an 11 x 17 flyer, including 8 photographs, to 12,327 residents of Inglewood. He noted that the flyer was racist and that it would seem to be very wise for AMAC Information & Graphics to want to distance itself from the anonymous source. He believed that the \$2,000 fine was insufficient, and asked why a civil action was not filed.

Senior Commission Counsel Melodee Mathay stated that the FPPC could not take civil action in this matter. Since the respondents caused the violation under section 83116.5, the Commission was limited to an administrative penalty. She agreed that it was an egregious violation that staff would have pursued civilly if they could have.

Ms. Mathay added that the case was forwarded to the FBI for a civil rights and hate crime violation, and to the Attorney General’s office. The Enforcement Division hoped that the other agencies could learn who the anonymous donor was. Mr. MacAlpin accepted full responsibility for the violation, expressed his regret that the incident occurred and assured staff that it would not happen again. Ms. Mathay hoped that the fine would send a

message to vendors of political mailers that this type of violation is unacceptable and would result in some public accountability.

Commissioner Downey moved approval of the stipulation.

Commissioner Knox seconded the motion.

Commissioners Blair, Downey, Karlan, Knox and Chairman Randolph voted “aye.” The motion carried by a vote of 5-0.

#### **19. Section 89519 - Surplus Funds: Adoption of Proposed Regulation 18951.**

Mr. Tocher explained that this regulation addresses permissible uses of campaign funds once they become surplus, noting that it clarifies certain areas. Decision 1 addresses the treatment of withdrawn candidates because they are not mentioned expressly by name. Mr. Tocher stated that staff incorporated changes as directed by the Commission.

Mr. Tocher presented two options for subdivision (a), which defines when campaign funds become surplus. The Commission previously agreed that withdrawn and non-incumbent defeated candidates should be treated similarly. Staff believed that, since the term “withdrawn candidate” not defined in either the Elections Code or the Government Code, the language of option A would address concerns. It would provide that withdrawn candidate funds are treated in the same manner as funds belonging to a non-incumbent defeated candidate, becoming surplus at the end of the post-election period following the election in which the candidate was defeated or from which the candidate withdrew.

Mr. Tocher stated that proposed subdivision (a)(3) would incorporate the decision of the Commission regarding surplus funds belonging to a deceased candidate.

Mr. Tocher stated that option C of subdivision (e) was a consolidation of the language in options A and B, providing explicit guidance for treatment of funds not otherwise subject to § 89519.

Commissioner Knox suggested that subdivision (a)(1) be broken down to separate the treatment of an incumbent who is leaving office without being defeated for reelection, and an incumbent who has been defeated for reelection. He suggested that there be a subdivision (a)(1)(i) providing that funds belonging to the incumbent who is leaving office without being defeated for reelection become surplus on the date the official leaves the office for which the funds were raised. Additionally, a subdivision (a)(1)(ii) could provide that the funds belonging to an incumbent who has been defeated for reelection be treated using staff’s proposal for subdivision (a)(1). He noted that he would be willing to rescind his suggestion if the other Commissioners did not find the staff proposal confusing.

Commissioner Downey stated that staff's language was a little awkward but that he was willing to go with it.

Chairman Randolph agreed, noting that the staff proposal was not hard to follow.

Chairman Randolph stated that she preferred option A of decision 1.

Commissioner Downey agreed.

Commissioner Karlan noted that the language in lines 19-21 was very helpful because it ties the regulation to the language of the statute. She asked why staff preferred option A, which did not include that language.

Mr. Tocher responded that staff was concerned that option B may say that it addresses non-incumbent defeated candidates, but its guidance was not specific enough. He explained that lines 12-14 say that the funds for which they are being raised and the election from which they withdraw are the time period.

Chairman Randolph stated that she did not like option B as much because it created an unnecessary fiction, calling a candidate who withdraws a non-incumbent defeated candidate.

Commissioner Karlan suggested that the heading for Option A be reversed to refer to defeated candidates first, since the language following deals with defeated candidates first.

Mr. Tocher agreed.

There was no objection from the Commission to option A.

There was no objection to accepting staff's recommendation to accept option C in subdivision (e).

Commissioner Karlan moved approval of the regulation with option A in subdivision (a) and option C in subdivision (e).

Commissioner Downey seconded the motion.

Commissioners Blair, Downey, Karlan, Knox and Chairman Randolph voted "aye." The motion carried by a vote of 5-0.

## **20. FPPC Resolution.**

Chairman Randolph introduced the resolution, noting that Commissioner Swanson was a very pleasant person to work with and that she will be missed.

Commissioner Blair moved approval of the resolution.

Commissioner Downey seconded the motion.

Commissioner Knox stated that Commissioner Swanson was a terrific Commissioner. Her strongest point was that she was not a lawyer. She was the only current member of the Commissioner who had ever been elected by majority vote for public office, and brought to the position a certain common sense of someone who had actually tried to raise money and garner votes. He noted that she was extraordinarily gracious, and that he will miss her presence on the Commission.

Commissioner Downey echoed Commissioner Knox's sentiments, noting that he could not have said it better.

Commissioners Blair, Downey, Karlan, Knox and Chairman Randolph (with enthusiasm) voted "aye."

## **21. Legislative Report.**

Executive Director Mark Krausse presented two companion bills. AB 1784 prohibits legislators from participating in decisions in which they have been lobbied by their campaign consultant or political attorney, and AB 1785, which prohibits lobbyists from lobbying a legislator when they have a business relationship with that legislator. He explained that the authors recognized a certain undue influence that a campaign consultant may have with a legislator/client, and should not be allowed to advocate the position of other clients. Mr. Krausse noted that the authors of both bills were very open to addressing staff concerns with amendments, which could save staff time later.

Mr. Krausse noted that the bill could incur costs on the Commission, and that staff would like to point those costs out to the Legislature for this and any future bill. He hoped, but did not necessarily expect, to receive funding from the Legislature, and to point out to the Legislature that each time they create a new mandate under the PRA, staff was forced to drop other projects in order to accommodate the new mandate. Additionally, he urged the Commission to request an amendment for these bills that would require that any court costs incurred by the FPPC defending a challenge to the bills would be paid out of the General Fund and not be taken from the FPPC budget.

There was no objection to the staff recommendation to support both bills if amended.

**22. Executive Director's Report.** The report was accepted as submitted.

**23. Litigation Report.** The Litigation Report was accepted as submitted.

The Commission adjourned to closed session at 11:59 a.m.

The public meeting was reconvened at 2:50 p.m. Chairman Randolph stated that there were no reportable actions during closed session, and adjourned the meeting.

Dated: September 3, 2003.

Respectfully submitted,

---

Sandra A. Johnson  
Executive Secretary

Approved by:

---

Chairman Randolph